

Ontario Human Rights Commission

Pursuant to the *Human Rights Code*, S.O. 1981, c. 53 as amended

IN THE MATTER OF the complaint of STEFAN (DIMITROV) KOLEV dated June 22, 1988, alleging discrimination in employment on the basis of handicap by McDONNELL DOUGLAS CANADA LTD. and HARRY BUCHMUELLER.

BEFORE: Frederick H. Zemans -- Chairman

Counsel for
The Ontario Human Rights Commission -- Cathryn Pike and
Lauren Bates

Counsel for
McDonnell Douglas Canada Ltd. and
Harry Buchmueller -- James B. Noonan and
Monique Smith

Introduction

On November 1st, 1991, I was appointed as a Board of Inquiry pursuant to the Human Rights Code, S.O. 1981. c. 53, as amended in the matter of the complaint of Stefan (Dimitrov) Kolev dated June 22, 1988 alleging discrimination in employment on the basis of handicap by McDonnell Douglas Canada Ltd. and Harry Buchmueller. Unfortunately, the arranging of the dates to hear evidence was a difficult process complicated by virtue of the complainant's desire initially to be represented by independent counsel. Ultimately, Stefan Kolev was represented by counsel for the Human Rights Commission (hereinafter "the Commission"), although he made a brief oral submission prior to the closing arguments. Evidence was heard on March 25, April 16, 28 and 29, May 20 and June 10, 1992. Final argument occupied all of June 25. All issues were well-prepared and effectively presented by both counsel.

At the outset of the hearing, counsel for the Commission requested that Stefan Kolev's Complaint be amended. After consideration, counsel for the Respondents agreed to the amendment of paragraph 14 of the Complaint to add claims pursuant to sections 10 and 22 of the Human Rights Code, (hereinafter "the Code").

From the outset of this Inquiry, Counsel for the Respondents underlined the need to separate the evidence necessary to determine the issues in Stefan Kolev's Complaint from another Complaint pending against the Respondent corporation, which potentially

overlaps with issues in this Inquiry. It was agreed that in this Inquiry the content of the McDonnell Douglas' application for employment forms and particularly its medical questionnaire would be considered only to the extent relevant to Stefan Kolev's Complaint.

The Evidence

The Complainant, Stefan Kolev, commenced working at McDonnell Douglas on February 24, 1986 as a senior progress chaser. On May 16, 1988 Stefan Kolev was given an ultimatum: either resign or be fired. Stefan Kolev was informed by the Respondent Harry Buchmueller that the decision to terminate Stefan Kolev was pursuant to the company practice of dismissing all persons who had untruthfully completed their original employment and medical forms. On May 17, 1988 Stefan Kolev resigned from his employment with McDonnell Douglas.

Stefan Kolev's first interview with McDonnell Douglas had been in the fall of 1985 when he expressed interest in being considered for any available work. He was told there was no employment at that time and to keep in touch. Stefan Kolev was again interviewed at the end of January 1986, when the possibility was raised of employment as a progress chaser, the work he had done at Canadian General Electric (CGE) from 1969-1978. Stefan Kolev's health was not discussed at either of the first two interviews with McDonnell Douglas.

A subsequent and lengthier interview took place on February 14, 1986. Stefan Kolev testified that he was told that, pending a medical examination, he would be hired as a senior progress chaser, and would generally be working in the main building (C Building). The only terms of employment provided to Stefan Kolev were that he would have similar responsibilities to those that he had CGE, but, as McDonnell Douglas was in the business of producing aircraft, he would be handling aircraft parts. Some time after he commenced work at McDonnell Douglas, Stefan Kolev received a job description for a senior progress chaser which stated that he was required to read work orders, blueprints and schedules to "progress materials and parts through the plant, keeping necessary records of progression". As well, the job description stated that as a senior progress chaser he was expected to "have a thorough knowledge of office and factory procedure and of the aircraft being manufactured or overhauled". (Exhibit 4)

On February 14, 1986 Stefan Kolev completed a McDonnell Douglas Employment Application. During his pre-employment medical examination on February 18, 1986, Stefan Kolev completed a medical questionnaire (Exhibit 6). This questionnaire asked Stefan Kolev if he had or had ever had any of ninety listed medical problems, including "allergies", "shortness of breath" and "asthma". Stefan Kolev put a tick in the "no" column beside every one of the ninety listed medical problems. At the bottom of the medical

questionnaire, just above Stefan Kolev's signature, was the statement:

I hereby certify that to the best of my knowledge the foregoing answers are complete and correct and I understand that any falsification of this record is cause for termination.

Stefan Kolev commenced his employment with McDonnell Douglas and, after training and a probationary period of sixty days, he was assigned as a progress chaser for DC-9 Spars production. His job was to ensure that parts required during the assembly of the Spars project arrived as scheduled. This job required Stefan Kolev to enter an area known as "D1/D8" at least twice a week for an average of thirty minutes.

The D1/D8 area was where the aluminum spars were milled. Stefan Kolev testified that, aside from noticing a "thickness of the air" that he felt was apparent to all who entered, he never had any trouble breathing in the D1/D8 area until an episode just before Christmas, 1986. In late 1986, as Stefan Kolev was walking through a section of D1/D8, he experienced difficulty breathing and felt very faint -- he described the experience as follows:

...it hit like a ton of bricks. I gasped and my concern was my head. When I was a kid I had surgery and I was given ether. It was a very similar experience and I went like this so fast. I barely had time to say "please carry me out". (Evidence 1:81)

Stefan Kolev did not report the incident to McDonnell Douglas nor did he visit the company doctor. He remained quiet because he feared he would lose his job if he did not. He continued to work and deliberately avoided passing through the particular area of

D1/D8 where the fainting spell had taken place.

Later, Stefan Kolev was assigned to the "F/8 Team Project". He continued to be able to carry out his duties without passing through the D1/D8 area. Stefan Kolev suffered no further related medical problems until late 1987. At that time he heard rumours that the Canadian government was withdrawing support for the F/8 Project and that as a result he might be transferred to work in the D1/D8 area of the plant. His concern over being transferred to the D1/D8 area, in combination with concern over ongoing labour-management conflicts, left him feeling very stressed. He began to experience tightness of the chest, shortness of breath, pain, wheezing and vertigo.

In December 1987 Stefan Kolev consulted his family physician, Dr. Gamulin, and a specialist, Dr. Jancelewicz. He was diagnosed as having asthmatic bronchitis. At this time Stefan Kolev did not report his condition to the plant.

On April 29, 1988 the F/8 Team Project was officially winding up and Stefan Kolev was told by his supervisor that he was being transferred to work in the D8 area. In an attempt to avoid being transferred to the D8 area, Stefan Kolev consulted the health clinic at the union hall, the union steward, and his supervisor. He informed John McMeekin that he had been diagnosed as having asthmatic bronchitis. His supervisor informed Stefan Kolev that

he should have mentioned it earlier and said: "This is a medical matter. I have to refer the matter to the doctor at the plant hospital". (Evidence 1:96)

The Complainant met with the plant hospital physician, Dr. Fenton, and told him that he had been diagnosed as having asthmatic bronchitis in December 1987 and about the fainting incident in the D1/D3 area. Stefan Kolev testified that his meeting with Dr. Fenton was "very casual" but when the issue of asthma was raised "he [Dr. Fenton] got very tense and from there it was like an interrogation session". (Evidence 1.98) The Complainant recognized that Dr. Fenton was concerned about whether Stefan Kolev had suffered from asthma prior to joining the company. Dr. Fenton told Stefan Kolev that he wanted him to obtain medical reports from Dr. Gamulin and Dr. Jancelewicz. The Complainant was issued an "employee physical limitation card" (known as a "pink card") that entitled him to work without being exposed to excessive dust or fumes. After being issued a pink card, Stefan Kolev was assigned to a clean work area, D3, for about a week. He was then transferred to the main building, C Building, where he had worked previously.

Both Dr. Gamulin and Dr. Jancelewicz gave Stefan Kolev letters to deliver to Dr. Fenton. Dr. Gamulin's letter (Exhibit 9) confirmed that he had known Stefan Kolev since December 1987 and that he suffered from chronic rhinitis and asthmatic bronchitis.

Dr. Gamulin's letter further stated that "he should avoid work in industrial pollution and should work in well ventilated area".

Dr. Jancelewicz prepared a medical evaluation dated May 3, 1988 (Exhibit 12) and a letter dated May 9, 1988 (Exhibit 10), the later of which stated:

I have been following this patient since 1976 with evidence of allergic rhinitis and asthma. He has also previously had nasal polyps.

It is imperative that he should work in a well ventilated environment free of excessive dust and he is not able to perform heavy physical work. Any forms of pollution, especially mist of aluminum dust may aggravate his hyperactive airway.

He has been doing very well lately except for intolerance to pollution. Overall, his symptoms are controlled with minimal medication.

Stefan Kolev testified that on May 10, 1988 he met with Harry Buchmueller, who worked in Labour Relations at McDonnell Douglas. At this meeting Harry Buchmueller expressed concern over the information he had received from Dr. Fenton and asked Stefan Kolev to sign a release to allow disclosure of the medical documents. Stefan Kolev was told that if he did not sign the release, he would be sent home or fired. Stefan Kolev reluctantly provided the release.

Stefan Kolev testified that at a subsequent meeting Harry Buchmueller accused him of falsifying his medical questionnaire. Specifically, Harry Buchmueller accused Stefan Kolev of lying when he said that he did not suffer from allergies or asthma. Stefan

Kolev testified that he explained that he had not known that he had asthma at the time, and, with regard to allergies:

I said, "No, I didn't lie because I never considered that I would harm the company and I've never been sick for one day because of allergies and I know to me it was not a handicap because it was just a nuisance and it didn't appear every fall and every spring.

Whenever it did, if I needed I took antihistamines and this was the end of the story. So I was never, ever thinking I will harm McDonnell Douglas. (Evidence 1:112)

Stefan Kolev testified that at this meeting he told Harry Buchmueller he did not report the fainting spell he had experienced in 1986 because he was concerned about losing his job. This was of particular concern in 1986 because his parents, whom he had not seen in many years, were about to arrive from Eastern Europe.

At the conclusion of the meeting Harry Buchmueller told Stefan Kolev that his only choice was to resign or to be fired. On May 17, 1988, Stefan Kolev gave Harry Buchmueller his resignation.

In June 1988, Stefan Kolev phoned Robert Drennan, the manager of Employee Services at McDonnell Douglas. Stefan Kolev testified:

I remember the most important conversation I had with him concerned instructions Mr. Bob Drennan gave me to get in touch with Dr. Fenton and Mr. Drennan told me he had already spoken to Dr. Fenton for a possible salvaging of the situation and possible comeback . . . (Evidence 1:119)

Dr. Fenton told Stefan Kolev that if he obtained an appropriately phrased letter from Dr. Jancelewicz, he could probably back to work. Stefan Kolev made an appointment with Dr. Jancelewicz and

during the appointment, Dr. Jancelewicz talked on the phone with Dr. Fenton. The result was a letter by Dr. Jancelewicz dated June 8, 1988, (Exhibit 11) to Dr. Fenton stating that Stefan Kolev's allergies were under control and that he should not be denied the opportunity to restart work.

After delivering the letter to Dr. Fenton, Stefan Kolev again spoke with Bob Drennan who told him that "he tried his best", but the decision was out of his hands and Stefan Kolev would not be allowed to return to work at McDonnell Douglas. (Evidence 1:122)

Stefan Kolev was cross-examined about the discrepancy between his evidence that he was not aware he had asthma at the time he applied to McDonnell Douglas and his Complaint to the Commission dated 22 June 1988 stating:

2. On or about February 18, 1986, I completed a post employment medical examination. On the form I answered 'no' to the question about if I had asthmatic condition. I did not feel it was necessary to reveal my allergies/asthma since the condition was maintained by medication. (Exhibit 2)

Stefan Kolev confirmed that his testimony was that he did not believe or know that he had asthma when he signed the job application form. He testified that he requested the Human Rights Officer who assisted him in preparing the complaint to remove "asthma" from paragraph 2, but was discouraged from doing so and told he could clarify the matter in court. Stefan Kolev agreed with

counsel for the Respondent that all of the internal reports of the Commission confirmed the content of paragraph 2 of his Complaint and that no request had been made to amend this paragraph at this Inquiry.

Dr. Zygmunt Jancelewicz testified about his treatment of Stefan Kolev. When he first examined him in 1976, while he unquestionably had allergic conditions, there was no evidence of asthma. At the next examination in 1981, Dr. Jancelewicz suspected asthma, but the test results lead him to conclude "he didn't have any". (Evidence 2:25)

Dr. Jancelewicz's third examination of Stefan Kolev took place in November 1987. The doctor testified that Stefan Kolev's symptoms at this point were "totally different" from the symptoms of asthma. (Evidence 2:254)

Dr. Jancelewicz said that when he wrote the letter of May 9, 1988 he did not intend to imply that Stefan Kolev had been diagnosed as having asthma since 1976. He testified that his motivation was to support Stefan Kolev in his request to be transferred to a cleaner working environment:

It was my belief that the patient would benefit from a bit of doubt as to whether he had asthma or not because some description of being short of breath and being helped by Tedrol which is a multi-faceted medication for asthma and other conditions too, but in this package having rhinitis and nasal polyps should he work in a polluted environment the condition could reoccur and make him potentially induce a relapse. Then Stefan Kolev told

me previously that he experiences nasal congestion in all kinds of polluted places like shopping plazas where there is dust and certain places at work he felt quite miserable while very well on the others. I said: "Okay, we will put asthma and put a question mark there to let him know it is not an established diagnosis." It may be questioned as to things he really had. The intention of the letter was to allow him to work in a cleaner environment. (Evidence 2:255 and 256)

Sita Ramanujam, the Ontario Human Rights Commission's manager of the unit for the handicapped, explained to the Inquiry that there was a dispute between the Commission and McDonnell Douglas concerning the medical questionnaire that Stefan Kolev was accused of falsifying. In 1984, as part of a settlement of another matter, McDonnell Douglas agreed to review its medical questionnaire. Sometime after Stefan Kolev was hired, McDonnell Douglas replaced the ninety question medical questionnaire with a form consisting of about thirty questions. (Exhibit 34)

Ms. Ramanujam testified that the Commission remained unsatisfied with the changes. The Commission requested that McDonnell Douglas replace its universal medical questionnaire with questionnaires tailored for different positions. The Commission further requested that the medical questionnaire be completed after an offer of employment had been made by the company.

On cross-examination Ms. Ramanujam stated that, given the job description for a senior progress chaser, it would be reasonable for McDonnell Douglas to ask about allergies in order to facilitate

any required accommodation.

Nick De Carlo, the president of the union local, testified that the air in the D8/D1 area was damp and misty. "The dampness came from the coolant used on the big machines and the mist from the chemical tanks". He also testified that not all of the 200 senior progress chasers were required to enter the D8/D1 area. (Evidence 3:325-329) Nick De Carlo stated that between 1986 and 1988 McDonnell Douglas employed about 3,300 employees of whom 350 to 400 worked in the D1/D8 areas.

Robert Rae, a hygienist for the Ontario Ministry of Labour, testified that he was involved in an inspection of McDonnell Douglas in 1987. The results of the inspection were included in the Ontario Ministry of Labour Inspection Report dated November 6, 1987. (Exhibit 36) Mr. Rae read from page 18 of the Report:

Safe and healthy work practices appear to take second place next to production requirements as opposed to being part and parcel of any procedures. Little change could be anticipated until these attitudes are changed through provision of adequate training and the support of top management. (Evidence 3:349)

Mr. Rae testified about a number of specific problems, including problems with the air quality of the D1/D8 area.

On cross-examination Mr. Rae testified that many of the problems at McDonnell Douglas were corrected before any orders were issued as a result of the inspection. All of the inspector's

orders were complied with within the time limit set out in each particular order. Evidence (3:353)

Harry Buchmueller was employed by McDonnell Douglas from March 1985 until February 1991. At the time of the Inquiry he was the Manager of Employment Standards for the Toronto Dominion Bank. Mr. Buchmueller was working in the Labour Relations department when Stefan Kolev's medical concerns came to his attention. Mr. Buchmueller testified that the issue first came up when he received a note from Dr. Fenton stating to the effect that there was a discrepancy in Stefan Kolev's medical forms. Mr. Buchmueller phoned Dr. Fenton and asked him two questions:

1. would Stefan Kolev have known about the discrepancy at the time he applied; and
2. was it materially relevant to his job circumstances? (Evidence 4:408)

Harry Buchmueller stated that when Dr. Fenton answered "yes" to both of these questions, he arranged a meeting with Stefan Kolev. At the meeting, he convinced Stefan Kolev to sign a waiver in order to allow him access to his medical records. (Evidence 4:409)

Harry Buchmueller testified that, based on Dr. Gamulin's letter dated May 2, 1988 (Exhibit 9), Dr. Jancelewicz's medical evaluation dated May 5, 1988 (Exhibit 12) and Dr. Jancelewicz's letter dated May 9, 1988 (Exhibit 10), he concluded that Stefan Kolev had been aware of his condition at the time he applied for

a job at McDonnell Douglas.

Harry Buchmueller testified that Stefan Kolev was fired solely because he knowingly falsified his medical history form. Robert Brian Sawyers, section manager of the Labour Relations Department, reviewed the "merits of the case" and concurred with the decision to terminate Stefan Kolev. (Evidence 4:416)

Harry Buchmueller testified that it was the policy of McDonnell Douglas to terminate anyone who knowingly lied on their work history form or medical history form. Mr. Buchmueller acknowledged that a limited discretion existed in cases where there was a doubt that the person had understood the forms, or in the case of falsified work history. However, Harry Buchmueller insisted that, in a case like Stefan Kolev's, he had no choice but to terminate.

Harry Buchmueller was involved in some of the terminations and suspensions listed on a memorandum entitled "Falsification Cases from September 1984" prepared by McDonnell Douglas. (Exhibits 37 & 37A). Harry Buchmueller explained some of the cases where an employee who had incorrectly filled out a work history or medical history form was not terminated. One employee, Mr. Rzepkowski, received only a one day suspension and was not permanently discharged after incorrectly filling out his medical history form:

Mr. Rzepkowski was a brand new immigrant and speaking with him personally, his English was very poor and I had

trouble understanding him. I believed after speaking with him that he did not fully understand the questions that were being asked about him. (Evidence 4:396)

Harry Buchmueller provided information about an example exercise of discretion in the case of a falsified work history:

Gail Kellett was a fairly new employee who had completed her probationary period and we discovered, subsequent to her completion of probation, that she had worked at Boot's Drug Store and had actually been terminated from there for stealing money from the till. At that point, prior to us discharging her, the union became aware of what was happening and the union made representations to management on her behalf and my manager and the union executive agreed to substitute a suspension, again in a without prejudice manner. (Evidence 4:392)

Like Mr. Rzepkowski, Ms Kellett received only a one day suspension.

On cross-examination, Harry Buchmueller stated that not every "technical" lie on a employee's medical history was grounds for termination, but only lies that would affect an employee's ability to perform the work:

...in Stefan Kolev's case, as I explained earlier, one of the questions was had we known about it at the time would it have affected his placement. For somebody who has an allergy to cats, there being no cats in the workplace, it would have no effect whatever on his ability to do the job that he is hired for... In his case he lied about having conditions that would seriously hamper his ability and he obviously, by his own admission, was not able to work in areas where there were heavy mists and fume and things like that. (Evidence 4:434)

When asked about why McDonnell Douglas did not accommodate Stefan Kolev's disability, Harry Buchmueller stated that it was because of his lie at the time of employment.

Q. Had he been forthright, you would have accommodated him?

A. Had he been forthright at the beginning, yes.
(Evidence 4:435 and 436)

Harry Buchmeuller stated that there had been very few cases where McDonnell Douglas was not able to accommodate an employee's medical problem: "In those cases the company had found a different position for the individual so that they are still able to hire them, even if it wasn't for the job they were originally hired for."
(Evidence 4:403)

Robert Drennan is currently Manager of Employee Services at McDonnell Douglas and he held that position at the time Stefan Kolev was forced to resign. One of his responsibilities has been to deal with human rights issues.

Bob Drennan explained that an applicant for employment at McDonnell Douglas is required to complete a medical history form and to see the company doctor. If the applicant divulges a medical problem or the doctor discovers a previously unknown medical problem, a letter is requested from the applicant's regular physician. After considering the letter from the applicant's physician, the company doctor either declares the applicant fit to work or fit to work with limitations. It was Bob Drennan's opinion that such a procedure is required to fulfil obligations under the Health and Safety Act. (Evidence 4:482 to 484)

Bob Drennan explained that in 1984 there was an Ontario Human Rights Complaint arising from a refusal to hire an applicant. As part of a settlement McDonnell Douglas agreed to review their application form and their medical history form. The review was commenced almost immediately and within six months the Human Rights Commission had approved changes to the application form. During 1986 and 1987 there were meetings between representatives of McDonnell Douglas and the Human Rights Commission about the medical history form, originally consisting of 90 questions, was reduced to 30 questions. McDonnell Douglas sent a letter to the Commission stating that they were unwilling to make any further changes. Nothing further was heard from the Human Rights Commission on this issue until November 1991, when someone phoned and inquired about the status of the medical history form.

Bob Drennan testified that, as long as he has known, it was the company's policy to terminate employees who have lied on their job application or medical history forms. When asked if it mattered what the person lied about, Bob Drennan replied:

If it's related to work history and it's by error we could reconsider, but normally with a medical history, if it is proven that the person knew he was lying, he would be terminated. (Evidence 4:487)

According to Bob Drennan, the union only becomes involved in a falsification case when there is some doubt as to whether the employee actually lied. He personally remembered two cases where the union intervened: in the cases of John Farnum and Nick De

Carlo. Both were accused of lying about their job application form. Mr. Farnum was discharged after a settlement without arbitration; Mr. De Carlo was reinstated after a fourteen month suspension as a result of arbitration.

Bob Drennan stated that only occasionally does McDonnell Douglas refuse to hire someone because of health problems. The only example in which he was personally involved was the refusal of an applicant who was extremely overweight and had circulatory problems. Bob Drennan said he had checked with Employment personnel at McDonnell Douglas, and they were only aware of one other case in the last five or ten years.

Bob Drennan testified that when an existing employee develops a health problem the company doctor issues a pink limitation card. McDonnell Douglas, sometimes in consultation with the union, will then attempt to accommodate the employee's physical limitations. Sometimes accommodation can prove difficult:

Right at this present moment we are in a downsizing position and we have real problems trying to find positions to place people who have limitations because of lay offs and bumping. (Evidence 4:503)

Where an employee has been deemed unfit to perform any job at McDonnell Douglas, they are placed on sick leave. Employees on sick leave receive less than 100% of their regular wages. After one year of sick leave a disabled employee is eligible for permanent disability benefits for a length of time equal to their length of service minus one year.

Bob Drennan stated that there never has been an employee fired because of a disability. However he was aware of Human Rights complaint against McDonnell Douglas that alleged discrimination after hiring because of a handicap.

Bob Drennan's involvement with the Complainant began when Stefan Kolev phoned him a couple of days after being forced to resign. Stefan Kolev told him he had been forced to resign because of medical problems. Bob Drennan suggested that Stefan Kolev get his physician to call the company doctor.

Following the phone call Bob Drennan spoke with Harry Buchmueller. Bob Drennan testified that Harry Buchmueller told him Stefan Kolev was terminated because he falsified his medical information and not because of his medical condition.

Bob Drennan said that his only further communication with Stefan Kolev was to tell him there was nothing he could do to help him. Bob Drennan said he only recalled one further telephone call about the Kolev matter: a call from someone with the Human Rights Commission, a week after talking with Stefan Kolev. Bob Drennan did not remember any further contact with the Commission about the Kolev matter.

Robert Brian Sawyers has held the position of Leader Labour

Relations at McDonnell Douglas for four years. Brian Sawyers stated that it is company policy to discharge an employee who has purposely lied on an application form. The policy has been in effect at least as long as the six years which he has worked at McDonnell Douglas. "I would expect forever, but six and a half year I can say for sure." (Evidence 5:527)

Brian Sawyers' attention was drawn to the case of Mr. Schwab. Mr. Schwab began working at McDonnell Douglas in 1983. In 1987, as a result of some complaints about Mr. Schwab's behaviour, it was discovered that Mr. Schwab had omitted informing the company that he had undergone psychiatric treatment prior to being hired. In August 1987, Mr. Schwab was discharged for falsification of his medical history form. Mr. Schwab was later reinstated due to "circumstances" which Brian Sawyers stated warranted reinstatement:

The company was satisfied that his failure to indicate the information in question on his application form was not deliberate. They were also satisfied that at that point that his medical condition was such that he could be returned to work. (Evidence 5:528)

Mr. Sawyers described why he concluded that the omission was not deliberate:

In a disciplinary interview that was conducted he had indicated that he had not had the problem for six or seven years and wasn't currently being treated for it and didn't figure he had to indicate it. (Evidence 5:529)

Brian Sawyers testified that Mr. Schwab was reinstated in March 1988 following the signing of a Memorandum of Understanding between McDonnell Douglas and the union. (Exhibit 41) The terms

of the memorandum included that Mr. Schwab would be reclassified as a Production Facilities Operator (with a resulting loss of pay). The memorandum also included:

Should the employee's behaviour and/or attendance demonstrate that he is not capable of regular attendance due to his ongoing medical problem, his employment will be terminated.

This agreement is without prejudice to the Company's position, and does not establish a precedent for any case of a same or similar nature.

Munir Khalid has been the Canadian Auto Workers Plant Chairman at McDonnell Douglas for eighteen years. He has been employed by McDonnell Douglas since 1966. As Plant Chairman, Munir Khalid deals with day-to-day problems, grievances and arbitrations. He previously represented an employee who was terminated for allegedly lying on an application form.

Munir Khalid stated that the union will grieve a discharge for allegedly lying on an application and, after considering the available facts, if the company has a strong case, the union will withdraw the grievance.

Munir Khalid said he had represented Mr. Schwab:

We made a presentation to the company that he had a problem prior to when he was hired but the problem was under control and he didn't realize he had to fill in any form when he was hired. (Evidence 5:539)

On cross-examination Munir Khalid stated that the only time

the union has taken a falsification case through to arbitration was in the case of Nick De Carlo, the current union president. (Evidence 5:546)

As the Union's Plant Chairman, Munir Khalid sometimes becomes involved in helping find accommodation for an ill or injured employee. If an employee acquires physical limitations and the supervisor of the department cannot accommodate the employee, then the employee will approach Mr. Khalid. During times of full employment, about 50% of the employees that approach Mr. Khalid are eventually accommodated; during slow times, far fewer are accommodated:

And now lay-off, we have massive lay-off going on right now and there are quite a few people with limitations, and maybe 5% I will be able to place them, I can't place everybody. (Evidence 5:541)

Munir Khalid testified that there is no provision in the collective agreement that would allow the union to file an grievance on behalf of an disabled employee who is not offered placement in a different position. Such an unaccommodated employee could collect sick leave benefits and then permanent disability benefits.

DECISION

The Code provides in section 4(1) as follow:

Every person has the right to equal treatment with respect to employment without discrimination because of handicap.

There was no dispute that Stefan Kolev's asthmatic bronchitis and his allergies constitute "handicaps" within the meaning of the Code. At both the time of his employment with and discharge by McDonnell Douglas, Stefan Kolev suffered from allergies and possibly asthma. Although there was conflicting evidence as to whether Stefan Kolev was aware that he had asthma at the time he completed the medical questionnaire, in my opinion nothing turns on this issue.

Stefan Kolev was discharged from McDonnell Douglas by Harry Buchmueller in May 1988, after Stefan Kolev brought to the company's attention the fact that he suffered from disabilities that rendered it difficult, if not impossible, for him to work in the area of the plant to which he was about to be transferred. McDonnell Douglas at no time denied Stefan Kolev's disabilities or claimed that it was not possible for the corporation to accommodate his disability. The corporate respondent did not base its case on section 16 of the Code which allowed it to assert that Stefan Kolev was "incapable of performing or fulfilling the essential duties or requirements" of his employment. Quite to the contrary. Counsel for McDonnell Douglas and its witnesses asserted that the company employed many disabled persons and was able to accommodate their needs. (Exhibit 40) McDonnell Douglas states simply that it discharged Stefan Kolev pursuant to its personnel policy of dismissal of any person who provides false information at the time of employment.

The initial question to be determined is whether Stefan Kolev's asthmatic bronchitis and his allergies were factors in McDonnell Douglas' decision to terminate him in May 1988. The evidence requires careful analysis because it is clear that McDonnell Douglas was aware of the disability at the time of termination and that it had in other instances been prepared to ignore falsification with respect to both previous employment and medical conditions. McDonnell Douglas' management and representatives of the union nonetheless maintained that the normative expectation was that an employee would be terminated if the employee had chosen to conceal a medical condition.

Counsel for the Commission agreed that concern over falsification was one of the reasons for termination, but asserted that another reason was the existence of Stefan Kolev's handicap and the potential impact of his activities on his ability to perform. If the disabilities played any role whatsoever in the termination decision, The Commission argued that the entire decision was tainted (R. v. Bushnell Communications Ltd. (1973), 45 D.L.R. (3d) 218; aff'd (1974) 47 D.L.R. (3d) 668 (C.A.); Horton v. Niagara (Regional Municipality) (1987), 9 C.H.R.R. D/3925). In this position, the Commission is clearly correct. If McDonnell Douglas made its decision to terminate employment even partly because of Kolev's disability, or because of the associated possible problems of accommodation this would violate sections 4

and 8 of the Code.

Stefan Kolev asserted that his dismissal after a two year history as a good employee resulted from the company's discovery that he suffered from a disability. Although Stefan Kolev testified that he did not indicate his disability at the time of employment because he considered his allergies to be controlled by mild medication and felt that they would not interfere with his employment, it is clear from his testimony, particularly the portion which concerns the fainting incident in late 1986, that he was concerned about the company's possible reaction to his disability. McDonnell Douglas argues that Stefan Kolev's concern was not with respect to the company learning of his disabilities, but rather with having his medical questionnaire shown to have been falsely answered.

Strong evidence of the company's concern about employees medical histories and potential job safety is found in the company's medical questionnaire. The questionnaire states clearly that "this information is to help place you in a job safe to yourself and to others according to your physical ability".

Stefan Kolev's employment was terminated by McDonnell Douglas after Harry Buchmueller determined that Stefan Kolev had lied on his medical questionnaire with respect to a medical condition that was considered relevant to his work. The Commission argued

strenuously that there was sufficient evidence to find that Stefan Kolev's termination was influenced, if not principally determined, by the company learning of Stefan Kolev's disabilities -- principally his asthmatic bronchitis. The Commission relies upon the conversations Stefan Kolev had with John McMeekin, Dr. Fenton and Harry Buchmueller. Commission counsel particularly underlined that Harry Buchmueller asked Dr. Fenton both whether Stefan Kolev would have known about his disabilities at the time that he joined the company as well as whether the disabilities were materially relevant to his position. Commission counsel further argued that when Harry Buchmueller made his decision to terminate, he considered that Stefan Kolev's disability was not an irrelevant allergy, such as one to animals, but rather allergy to heavy mists and fumes which are found in an industrial environment. The argument put by the Commission was that this acknowledged concern with the disability was clear evidence of direct discrimination and brings the Complaint within the Code.

I have carefully considered the evidence of all witnesses and particularly Stefan Kolev and employees of the corporate respondent with respect to Stefan Kolev's employment termination. Although, it was and continues to be my opinion, that the company acted harshly towards Stefan Kolev and that they could have exercised discretion towards him as they had towards a number of other employees, I am nonetheless convinced that the company's sole basis for its termination of Stefan Kolev was premised on its long

standing practice of termination for falsification in answering both the employment application and the medical questionnaire. All employees of the company -- including union leadership -- agreed that this was corporate policy which was modified only on rare occasions. Exhibits 37 and 37A substantiate this position. These exhibits show that between 1984 and 1991, ten employees, including Stefan Kolev, were terminated by McDonnell Douglas for falsification of medical history. Of the ten, the company exercised its discretion and reinstated four. (Some reinstatements were made after union intervention). There are a number of employees who had similar length of tenure as Stefan Kolev who were discharged.

Although I have strong reservations about the termination policy followed by McDonnell Douglas in this case, my jurisdiction is established by the Code. I do not find that there is evidence of direct discrimination. To the contrary, Bob Drennan's evidence convinces me that the corporation, after being informed of the human rights Complaint and recognizing the implications of such a Complaint, the company remained committed to its original decision pursuant to its falsification policy. The company's refusal to reinstate Stefan Kolev in June 1988 confirms its original dismissal on the basis of falsification.

I must consider whether the Respondent's reliance upon certain questions in the medical questionnaire, which may contravene the

Code, bring Stefan Kolev's complaint within the section of the Code, despite my conclusion that there was no direct discrimination within section 4. Section 8 reads as follows:

8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

Counsel for the Commission argued that the Respondent corporation was not entitled to ask Stefan Kolev to complete the medical questionnaire because it was inappropriate and that since the Respondent was prohibited from asking the questions contained therein, Stefan Kolev had no obligation to answer the questionnaire correctly and therefore could not be subsequently punished for incorrect answers.

Section 22(2) of the Code provides that the section 4 right to equal treatment "is infringed where a form of application for employment is used or written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualification" by a prohibited ground of discrimination. Section 22(3) qualifies section 22(2) by providing that, at a personal employment interview, questions can be asked about a handicap "where discrimination on such ground is permitted under this Act." Finally, section 16(1) provides that a right is not infringed "for the reason only that the person is incapable of performing or fulfilling the essential duties" of employment because of a handicap. Section 22(3) would seem to allow questions, during the course of an employment interview, that assist in determining

whether an applicant for employment has a disability that will prevent performance of the essential duties of employment. Commission counsel argued that the McDonnell Douglas medical questionnaire was "a written inquiry" that directly or indirectly could classify Stefan Kolev on the basis of a handicap. The questionnaire contained a litany of questions that were not related to his capability of performing the essential duties of the position for which he was applying. Specifically, Commission council asserted that the questions concerning asthma and allergies were not related to his capability of performing essential duties.

Counsel for the Commission conceded the sections 22(2) and 22(3) of the Code are of limited assistance in determining what questions are appropriate to ask in a medical questionnaire. Commission counsel agreed that some questions about allergies would be appropriate in certain circumstances, but such a question would have to be more specific than the question on the McDonnell Douglas medical questionnaire at the relevant time. Commission counsel suggested that an appropriate question is:

This particular area of the plant involves exposure to X, Y, and Z. Have you a sensitivity to those substances or do you have an asthmatic condition that would prevent you from working in this environment?

Commission counsel argued that I should accept the following interpretation of section 22(2) for the purpose of this Inquiry:

What an employer may not do is ask an applicant to list all the conceivable physical or mental ailment without determining which of these ailments are relevant to performing particular job functions. This is an overly broad approach that runs afoul of the Code because it

puts all the information at the disposal of the employer who may or may not use that information so as to discriminate against the individual.

Counsel referred to the decision of Constance Backhouse in Engell v. Mount Sinai Hospital (1990), 11 C.H.R.R. D/68 (Ontario Board of Inquiry). This decision involved the dismissal of employee who went on a vacation to Europe even though she had been denied vacation leave. The Board of Inquiry concluded that one of the factor in denying vacation leave was that the employee had been absent for some time due to a handicap. It was also noted that the Complainant's supervisors felt some bitterness that they were not informed of the Complainant's handicap, multiple sclerosis, at the time she was hired. Professor Backhouse noted:

Engell did not notify her employer of multiple sclerosis at the point of hiring, something she was not required by law to do. Indeed, section 22(2) of the Code prohibits employers from making written or oral inquiries during the employment application process that would either directly or indirectly permit a classification by handicap. Furthermore, the multiple sclerosis had no impact on Engell's work until the summer of 1984...

I find that the appropriateness of the McDonnell Douglas medical questionnaire is obiter to my determination, as were Professor Backhouse comments with respect to section 22(2) in Engell. I am attracted to the thinking of Professor H.A. Hubbard in Bonner v. Ministry of Heath (1992), unreported (Ontario Board of Inquiry):

While it may be that applicants have no duty to disclose their handicaps, surely a prospective employee with an invisible handicap requiring certain accommodation in order for him or her to be able to perform the work in question has some obligation to disclose that handicap

if such assistance is reasonably to be expected.

Commission counsel argued that Stefan Kolev had no notion that he had a handicap that would require accommodation. It was Commission counsel's contention that, as the Respondent McDonnell Douglas did not provide Stefan Kolev with sufficient information to suggest that his medical condition would affect his ability to perform the essential duties of his job, Kolev had no reason to consider his allergies or his asthma as relevant to his employment.

Commission counsel suggested that if an employer can fire an employee for not correctly providing information that it is not legally entitled to require, then an employer could do "an end run around the Code". Thus, the Commission argues, in order to protect the effectiveness of the Code, an employer should not be allowed to fire an employee who has incorrectly answered a prohibited question.

As stated earlier the Respondents took the position throughout the Inquiry that they based their decision, wisely or otherwise, on the untruthful answers given by Stefan Kolev in his medical questionnaire. Respondent counsel argued that McDonnell Douglas was entitled to know about Stefan Kolev's disabilities but that it was the company's duty as an employer to provide a safe work place. Specifically, the Respondent's duty relies on The Occupation Health and Safety Act, R.S.O. 1980, c.321 and specifically sub-section 14(2)(g), which requires that an employer "shall take every

precaution reasonable in the circumstances for the protection of a worker". Respondent counsel argued that his client is not in a position to avoid placing an employee in an area where he or she may feel dizzy or even faint if the employer has not been informed of any medical condition.

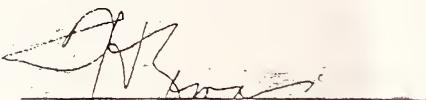
This issue has troubled me both in terms of the implications for this case as well as for any subsequent Inquiry which may consider the employment application and medical questionnaire forms of McDonnell Douglas. Ultimately, I find that it is not necessary in determining this matter to decide whether the medical questionnaire in use at the time of Stefan Kolev's hiring was appropriate or might contravene section 22 of the Code. Its contents only became relevant some two years later when he requested that the company give him medical exemption from working in certain areas where he was bothered by the air pollution.

The question for this Inquiry is what informed the decision made by Harry Buchmueller and endorsed by his superiors in the spring of 1988, when for the first time the corporate respondent became aware of Stefan Kolev's disability. As stated earlier, I find that the termination decision was based exclusively on McDonnell Douglas' long-standing policy with respect to falsification. I do not find that this policy, albeit harsh in its impact on Stefan Kolev, directly or indirectly contravened any of the provisions of the Code or that Stefan Kolev's disabilities

in any way informed the Respondent's decision. The facts of this case lead me to conclude that McDonnell Douglas decided, rightly or wrongly, to terminate Stefan Kolev's employment because the company considered his actions at the time of his employment to be inappropriate.

I have therefore decided that Stefan Kolev's Complaint against McDonnell Douglas and Harry Buchmueller is without foundation and must be dismissed. In the circumstance, I have no reason to deal with the question of remedies.

Dated at Toronto, Ontario this 9th day of September, 1992.



P.H.Zemans
Chair, Board of Inquiry.